United Nations **AT**

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1002

Case No. 1094: IBEKWE

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha A. Echols; Mr. Spyridon Flogaitis;

Whereas at the request of Ngozi Ibekwe, a staff member of the Office of the High Commissioner for Human Rights (hereinafter referred to as CHR), the President of the Tribunal, with the agreement of the Respondent, extended to 31 August 1999 the time-limit for the filing of an application with the Tribunal;

Whereas, on 31 August 1999, the Applicant filed an Application containing pleas which read as follows:

"II. PLEAS

8. The Applicant ... requests that the [United Nations Administrative Tribunal (UNAT)] take Oral Arguments so that the Applicant ... [has] the opportunity to question ... witnesses ...

Procedural Matters

9. ... [T]he Applicant requests that medical tests be administered to determine the paternity of Ms. [R.] Hijazi's child ...

10. … [The] Applicant requests the Tribunal to order the Administration to answer … interrogatories …

…

12. The Applicant requests that his review be considered solely *in camera*, based both upon written documents and an oral hearing.

…

15. The Applicant respectfully requests that the UNAT order the Secretary-General to provide the following redress as a result of the Applicant's treatment by [the] Respondent, as detailed below:

- The quashing of the [Secretary-General]'s impugned decision to impose a written warning in her file and a one year suspension on step increases in her salary …
- Request for removal of all records of said incident from the Applicant's file;
- Reinstatement of all step increases with retroactive effect;
- The complete dismissal of all the foregoing charges against the Applicant;
- An award of moral damages to the Applicant in respect of the moral and physical strain the foregoing wrongful allegations have visited upon the Applicant;
- The award to the Applicant of the amount of CHF 7,500 for costs and expenses and legal fees incurred in defense of this action;
- The retroactive grant to the Applicant of an SPA [special post allowance] for the past thirteen months in recognition of her performance of the duties of Administrative Assistant, which SPA has been wrongfully denied the Applicant;
- Withdrawal of any and all poor performance evaluations of the Applicant by … which were occasioned by the foregoing prejudice and bias of … against the Applicant;
- That the Applicant's most recent service performance be evaluated by an unbiased independent panel forthwith;
- An award in recognition of the imbalance of power between the Administration and short-term contract employees which would send a message to the Administration to treat said employees with dignity and respect; and
- Such other relief as the UNAT deems necessary, just and equitable."

Whereas the Respondent filed his Answer on 6 February 2001;

Whereas the Applicant filed Written Observations on 30 May 2001;

Whereas the Tribunal ruled on 10 July 2001 that no oral proceedings would be held in the case.

Whereas the facts in the case are as follows:

The Applicant joined the United Nations on 19 May 1980 as a Clerk at the G-2 L level with the United Nations Volunteers Program (UNV), UNDP, Geneva, on a short-term appointment. The Applicant subsequently served on several fixed-term and short-term appointments with two breaks in service, until 1 March 1988, when she joined CHR as a Secretary, at the G-4 level, on a four-month short-term contract, which was extended several times. The Applicant's current appointment with CHR is scheduled to expire on 30 September 2001.

In a letter dated 7 March 1997, a colleague of the Applicant, Ms. Hijazi, complained to the Director-General, UNOG, that on 5 March 1997, the Applicant had made slanderous and defamatory remarks to her while passing her on the way to the Cafeteria. Ms. Hijazi also stated that it had been brought to her attention that the Applicant had made the same remarks about her to other members of the staff on other occasions and requested the Director-General to take appropriate action to rectify the situation.

In a memorandum dated 18 March 1997, the Chief, Personnel Service, United Nations Office at Geneva, (UNOG), advised the Applicant that a complaint had been made against her and requested her to provide comments by 26 March. On 21 March 1997, the Applicant submitted preliminary comments. On 18 April 1997 and on 18 July she was asked to submit further written comments no later than 5 May and 4 August 1997, respectively. The Applicant's comments of 4 August 1997 concluded that "all these allegations coupled with false testimonies attest to a conspiracy aimed at destroying my career development and ultimately preventing the renewal of my contract at its expiry".

On 12 August 1997, the Applicant was notified that the entire dossier would be forwarded to the Office of Human Resources Management (OHRM), for review and advice on the course of action to be taken.

On 23 October 1997, the Director, Specialist Services Division, OHRM, presented the Applicant with allegations of misconduct, stating that the alleged conduct, if established, "would

constitute a violation of the applicable standards of conduct". The Applicant was informed of her right to counsel of her own choosing and requested to submit further comments if she so desired. The Applicant submitted her comments on 18 November 1997.

On 16 February 1998, the Chief, Personnel Service, UNOG, submitted the case to the Joint Disciplinary Committee (JDC), Geneva.

On 3 December 1998, the JDC conducted a formal hearing during which the parties and witnesses were heard. The JDC adopted its report on 5 February 1999. Its conclusion, recommendation and special remark read as follows:

"CONCLUSION AND RECOMMENDATION

78. ..., the Panel **concludes** that:

a. There was evidence indicating that a bitter exchange took place between the staff member and [another staff member], and that it was highly likely that offensive remarks were made by both parties;

b. There was evidence to the effect that, in conversations with two other staff members, the staff member had made the statements she has been charged with; and

c. In view of what it deemed mitigating factors of the case (...), *the staff member's overall behaviour could not be characterized as misconduct.* Furthermore, in the view of the Panel, the staff member should not alone bear the responsibility for the unfortunate incidents under examination.

79. The above notwithstanding, the Panel was of the opinion that the staff member's behaviour was not acceptable, and therefore **recommends** to the Secretary-General that in accordance with staff rule 110.3 (b) (i) the staff member be reprimanded in writing for her behaviour in this instance.

SPECIAL REMARK

80. Based on its experience in this case, the Panel would wish to draw the attention of the Secretary-General to instances where deteriorated interpersonal relations give rise to investigations by the Administration. In this connection, the Panel considers that initial face to-face interviews by the Administration of all the parties involved can prove enlightening in the determination of the course of action to follow. Had such interviews been conducted at the outset of this case, the Administration would have had a clearer picture of the context in which the events in question took place and – the Panel believes – disciplinary proceedings might have been avoided. More importantly,

bearing in mind that the main incident occurred nearly two years ago, quicker remedial action might have been taken, at the level of the Unit concerned, by the Administration.

81. ... the Panel considers that all staff members involved in this case might have benefited from relevant training opportunities and services available within the Organization."

On 11 March 1999, the Under-Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed her as follows:

"...

The Secretary-General has given careful consideration to the finding and conclusions of the Committee. While in agreement with most of the Committee's conclusions, the Secretary-General does not accept that your behaviour does not amount to misconduct and that you should not alone bear responsibility for the incidents in question. The Secretary-General observes that such a determination is inconsistent with the Committee's finding that you did make slanderous statements about your colleague to two other staff members. He considers that this is an act for which you alone are responsible. The Secretary-General further considers that, by spreading slanderous and harmful rumours about a colleague, your conduct fell short of the standards of conduct expected of an international civil servant, that it violated in particular staff regulation 1.4 and that it amounted to misconduct within the meaning of staff rule 110.1.

The Secretary-General has therefore decided to impose upon you a written censure for your misconduct and unbecoming behaviour for an international civil servant. This letter constitutes the written censure and is also to serve as a warning that any recurrence of such behaviour will not be tolerated. A copy of this letter will be place in your official status file.

..."

On 31 August 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The charge of verbal assault does not exist in law: the Applicant was disciplined not for verbal assault with which she was charged, but rather for other alleged misconduct. This procedural irregularity violates her rights of due process.

2. The alleged behaviour does not rise to the level of misconduct and the disciplinary measure imposed is disproportionate and excessive.

3. The allegations against the Applicant arose from malice, bias and prejudice.

4. The impugned administrative decision of the Secretary-General is based on charges which arise from errors of law, erroneous conclusions, omissions of fact and mistakes of fact and has caused grave moral injury to the Applicant and grave damage to her career prospects.

5. The failure of the JDC and the Administration to order the paternity test requested by the Applicant denied her a reasonable defense.

6. The Applicant's due process rights were violated because she was neither able to obtain counsel of her own choosing, nor allowed to confront those who testified against her.

Whereas the Respondent's principal contentions are:

1 The Applicant's argument that verbal assault is a non-existent offense which cannot be defined as misconduct is without merit.

2. The Applicant was fully informed of the charges against her and given ample opportunity to respond to them.

3. The Applicant's due process rights were fully respected in conformity with all applicable procedural requirements of staff rule 110.4.

4. It is within the Secretary-General's discretionary power to determine what behavior constitutes misconduct, as well as the disciplinary measures to be imposed.

5. The disciplinary measure imposed on the Applicant was not disproportionate or excessive.

6. The decision of the Respondent was not tainted by malice, bias or prejudice.

The Tribunal, having deliberated from 10 to 26 July 2001, now pronounces the following judgement:

I. In her Application, the Applicant requests, *inter alia*, that the Tribunal order rescission of the decision to impose a written censure upon her for misconduct and behaviour unbecoming an international civil servant and removal of all records of the incident at issue from her Official Status file; and that it award her compensation for moral damages.

II. The Tribunal considers that the main issues in the case are the Applicant's contentions that her rights of due process were violated as there was a shift in grounds in the charges against her; that the witnesses against her were motivated by malice, bias and prejudice; and, that the disciplinary measure taken was disproportionate.

III. The Tribunal finds no evidence substantiating the Applicant's contention that the Administration violated her rights of due process under staff rule 110.4. It notes that the Applicant was properly notified of the allegations against her and given a reasonable opportunity to respond thereto, was given the right to seek assistance with her defense, and that the matter was referred to a JDC. The Tribunal is therefore satisfied that the Applicant's rights of due process were respected.

IV. The Tribunal finds no evidence that the witnesses against the Applicant were motivated by malice, bias and prejudice. It notes in this regard that, when making such contentions, the burden of proof is on the Applicant (see Judgements No. 874, *Abbas* (1998) and No. 553, *Abrah* (1992)) and that she has failed to meet her burden.

V. The Tribunal rejects, *ab initio*, the Applicant's plea that a paternity test be imposed. The issue of paternity is entirely irrelevant in this case, which is one of verbal assault.

The Applicant contends that, since the charge of verbal assault does not exist in law and since she was never formally presented with allegations of misconduct, the JDC erred in making a finding of misconduct. The Tribunal disagrees with the Applicant on both counts. First, the Tribunal holds that verbal assault can amount to misconduct subject to disciplinary proceedings under the applicable Staff Regulations and Rules. Moreover, the Tribunal notes that, on 23 October 1997, the Director, Specialist Services Division, OHRM, sent the Applicant a

memorandum, headed "Allegations of Misconduct", charging her with conduct which, "if established, would constitute violation of the applicable standards of conduct". In her reply dated 18 November 1997, the Applicant also used the subject heading "Allegations of Misconduct" when she denied the allegations made against her. In light of this exchange of correspondence, the Tribunal cannot accept the contention of the Applicant that the charge of misconduct was not formally communicated to her.

Accordingly, the Applicant has failed to substantiate that there was a shift in the charges against her, from verbal assault to misconduct.

VI. The imposition of disciplinary measures involves an exercise of discretion on the part of the Administration, which must comply with the standards prescribed by the Tribunal, including the principle of proportionality (see Judgements No. 890, *Augustine* (1998); No. 897, *Jhuti* (1998); No. 898, *Uggla* (1998); and, No. 941 *Kiwanuka* (1999). In the instant case, the Tribunal must examine whether the Applicant's conduct amounted to misconduct warranting disciplinary measures, and whether the disciplinary measure taken was proportionate. The Tribunal disagrees with the Secretary-General's decision that the Applicant's conduct was misconduct meriting disciplinary action. It agrees with the findings of the JDC that because offensive remarks were made by both parties, the Applicant should not bear the sole responsibility for the unfortunate incidents and that there were mitigating factors. In this regard, the Tribunal recalls Judgement No. 773, *Sookia* (1996), a case involving physical assault in which the Applicant was never formally disciplined. The Tribunal therefore concurs with the conclusion of the JDC that, "the staff member's overall behaviour could not be characterized as misconduct".

Nonetheless, the Tribunal does find that the Applicant failed to conduct herself "in a manner befitting [her] status as [an] international civil [servant]" in accordance with staff regulation 1.4 and agrees with the JDC that a written reprimand would have been appropriate.

VII. The foregoing notwithstanding, the Tribunal wishes to take this opportunity to note that cases like this should be disposed of without reaching the disciplinary stage.

VIII. For the reasons stated, the Tribunal:

(i) Orders rescission of the decision of 11 March 1999 to impose upon the Applicant a written censure for her misconduct and unbecoming behaviour an international civil servant;

(ii) Orders that all references to such written censure be removed from the Applicant's file; and,

(iii) Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Marsha A. ECHOLS
Member

Spyridon FLOGAITIS
Member

Geneva, 26 July 2001

Maritza STRUYVENBERG
Executive Secretary